IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL. PLAINTIFFS

VERSUS CIVIL ACTION NO. 3:18-cv-00171-CWR-FKB

THOMAS E. DOBBS, M.D., ET AL. DEFENDANTS

STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE CARLTON W. REEVES,
UNITED STATES DISTRICT COURT JUDGE,
JUNE 4, 2021,
JACKSON, MISSISSIPPI

(APPEARANCES NOTED HEREIN.)

REPORTED BY:

CANDICE S. CRANE, RPR, CCR #1781
OFFICIAL COURT REPORTER
501 E. Court Street, Suite 2500
Jackson, Mississippi 39201
Telephone: (601)608-4187
E-mail: Candice_Crane@mssd.uscourts.gov

APPEARANCES VIA VIDEOCONFERENCE:

FOR THE PLAINTIFFS:	AARON S. DELANEY, ESQ. CAITLIN GRUSAUSKAS, ESQ. ALEXIA D. KORBERG, ESQ. HILLARY SCHNELLER, ESQ. SHAYNA MEDLEY, ESQ. JENNY MA, ESQ. ROBERT B. MCDUFF, ESQ.
FOR THE DEFENDANTS:	PAUL E. BARNES, ESQ. WILSON D. MINOR, ESQ. ROBERT E. SANDERS, ESQ. RAYFORD G. CHAMBERS, ESQ. LEE DAVIS THAMES, ESQ.
ALSO PRESENT:	WILLIAM "TREY" JONES, III, ESQ. JACOB A. BRADLEY, ESQ. SANDER SABA KAHOLI KIYONAMI

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PROCEEDINGS VIA VIDEOCONFERENCE, JUNE 4, 2021

THE COURT: Good morning. This is the matter of Jackson Women's Health Organization versus Thomas E. Dobbs, Civil Action 3:18-cv-171-CWR-FKB. We're here by Zoom with the parties on a joint motion for continuance and request for expedited consideration and other issues.

Who do I have on for the plaintiff?

MR. DELANEY: Your Honor, it's Aaron Delaney for the plaintiffs from Paul, Weiss, Rifkind, Wharton & Garrison. With me today making appearances are my colleagues Alexia Korberg and Caitlin Grusauskas, and I've also got a couple colleagues not making appearances from Paul, Weiss, Sander Saba and Kaholi Kiyonami, from -- just to observe and assist.

And then my co-counsel is also here -- I can let them introduce themselves -- from the Center for Reproductive Rights and also Mr. McDuff, I believe.

THE COURT: Okay.

MR. MCDUFF: Good morning.

THE COURT: Good morning.

MR. MCDUFF: Good morning, Your Honor. This is Rob McDuff; I'm on phone but not video.

THE COURT: Okay. Thank you, Mr. McDuff.

MS. SCHNELLER: And good morning, Your Honor. This is Hillary Schneller from the Center for Reproductive Rights, and

with me are my colleagues Jenny Ma and Shayna Medley.

THE COURT: Okay. Anyone else for the plaintiffs?

Okay. So who's representing the defendant? Defendants, I guess, yeah.

MR. BARNES: Your Honor, this is Paul Barnes with the Mississippi Attorney General's Office representing the state defendants, Dr. Dobbs and Dr. Cleveland. Also with me is my colleague Wilson Minor; he's here in the room with me, but he has his video and audio turned off. And we also have counsel for some of the local defendants.

THE COURT: I'm sorry, Mr. Barnes. You broke up. You also have counsel for whom?

MR. BARNES: I said I believe we also have some counsel for some of the local defendants who can identify themselves.

THE COURT: Okay.

MR. SANDERS: Yes, Your Honor. Your Honor, my name is Bob Sanders. I don't know whether you can see me. I can't see myself up there, but I represent the Hinds District Attorney, Jody Owens.

THE COURT: Thank you, Mr. Sanders. We do not see you, and that's fine. I can hear you well.

Any other defendants?

MR. CHAMBERS: Your Honor, Ray Chambers here on behalf of County Attorney Gerald Mumford.

THE COURT: Okay. Any other parties? Any other

parties or counsel present?

MR. THAMES: Your Honor, this is Lee Thames. I represent the City of Jackson.

THE COURT: Okay, Mr. Thames. Thank you.

MR. JONES: Good morning, Your Honor. This is Trey Jones, and I've got Jake Bradley here with me, and we represent some members of the legislature, the Mississippi Legislature, and there's a pending discovery motion involved. We're not parties to the case.

THE COURT: Okay. Thank you, Mr. Jones.

All right. Anyone else?

I realize this is a joint motion, at least on this issue with respect to continuing the case and for the request for expedited consideration. I'll hear from the parties, whichever way you want to be heard on this particular motion.

I know there's some disagreement about the timing or the schedule, so, Mr. Barnes, I'll start with you.

MR. BARNES: Yes, Your Honor. Since I did actually file the joint motion on behalf of the parties, just very briefly give the Court the background. Shortly after the Supreme Court, rather unexpectedly, granted cert on the 15-week law, Ms. Schneller and I began conferring -- we are the counsel of record in the Supreme Court -- about the potential impact that the Supreme Court case might have on the litigation at this level.

Over the next couple of weeks, Mr. Delaney got involved, and last week we conferred and reached an agreement that neither side believed that it was workable or feasible to try the case in December after the Supreme Court has informed us that -- or the clerk has informed us it's very likely that the case will be heard for argument in November. And obviously there's substantial overlap -- excuse me -- with the briefing schedule, the remaining briefing schedule on dispositive and *Daubert* motions here as well as the briefing schedule in the Supreme Court.

And as I know you're aware, preparation for oral argument for a Supreme Court case, especially one of this magnitude, is an all-in-type endeavor.

So we conferred. We were able to agree on that fact; both sides agreed that we needed to ask the Court if the Court would be willing to please move the case out of December, and that's where we had a little bit of a disagreement. We know the case has been going on now for three years, and we all want to get it to the finish line. But, Your Honor, it is -- and that's why the joint motion, obviously. We drafted (AUDIO GAP) one paragraph and the plaintiffs drafted the other about our positions.

It's our position that even -- nobody can predict what the Supreme Court will do. I'm certainly not going to try to tell the Court or make a prediction, but certainly it is

significant. And it has been recognized as possibly, you know, a very significant case in abortion law in general, but certainly it has the potential to have an impact on the legal issues that the Court is going to have to consider even in Part II. And so it is our position, state defendants' position, that the Court should, in our view, wait until the Supreme Court has ruled, then hold a status conference, set a new trial date and final briefing schedule for the pending motions, and move forward from there.

At that point -- obviously I'll be happy to answer any questions the Court has, but I guess it will be -- next I think either Mr. Delaney or Ms. Schneller probably should pick up from there with their position.

THE COURT: Okay. Who -- Mr. Schnell- -- excuse me, Ms. Schneller, Mr. Delaney, which of the two of you?

MR. DELANEY: Your Honor, it's Aaron Delaney. I'll speak on behalf of the plaintiffs on this motion.

So, Your Honor, I want to start by echoing Mr. Barnes that, you know, we do fundamentally agree that, you know, this unexpected cert grant has created a conflict between the two cases, and obviously, Your Honor, they're both incredibly important, incredibly significant cases and parts of the same case, and we want to make sure we give them both fair, adequate, and complete attention.

And that's why, Your Honor, we're in agreement with

Mr. Barnes that the trial and the briefing schedule should be -- there should be a continuance on both just to accommodate the Supreme Court schedule given the burdens not only on the attorneys but also, Your Honor, a Supreme Court case creates actually a significant burden on our clients who, you know, are dealing with the demands of that, the media, and all the things that come along with a Supreme Court case but also, you know, running the clinic day to day, and it's a leanly run clinic as it is.

So we do think it's important to recognize those burdens, and that's why we're agreeing with Mr. Barnes on the continuance as a conceptual matter.

I think where we disagree, Your Honor --

THE COURT: Mr. Delaney -- Mr. Delaney, we do have a court reporter here taking a transcript of this, so I'll ask that you slow down just a little bit.

MR. DELANEY: Absolutely.

THE COURT: I'm following you fine. I just want you to slow down for my court reporter.

MR. DELANEY: Mr. Barnes is laughing. He knows I always do this. No problem, Your Honor, and I apologize to the court reporter.

So I think where we disagree, Your Honor -- and it will be no surprise to you -- is on the potential impact of the Supreme Court decision, when it comes, on this case. And why

we are disagreeing with Mr. Barnes on staying this case, basically, until after the decision is for a few reasons, Your Honor.

One, as a practical matter, as you're well aware, there are abortion cases going on all over this country at any given time, and there has been -- this is now the third Supreme Court grant in the last five or six years, and as a practical matter, all those cases can't simply stop completely once the Supreme Court, you know, takes one of these cases.

Now, obviously it's in our case, and this is why we're saying we need a short continuance so they don't conflict, but we don't think the whole case has to stop in its tracks until the Supreme Court makes a ruling.

But more importantly, Your Honor, we think our case is going to be tried under the undue burden standard that was set forth in *Casey* and which has been applied multiple times since that, since *Casey* was decided in 1992. And we just don't think the standard is going to fundamentally change as a result of the current Supreme Court case. At its core --

THE COURT: Mr. --

MR. DELANEY: -- the issue before the Supreme Court right now --

THE COURT: Mr. Delaney, let me interject right here --

MR. DELANEY: Yeah.

THE COURT: -- and ask a question.

The question before the U.S. Supreme Court in this case, they certified one question as I take it, and it's to the effect of -- I mean, I'm not -- I'm paraphrasing. It's whether any and all pre-viability restrictions are unconstitutional; isn't that the question that the Supreme Court has asked you-all to present to it?

Is that the question that will be addressed --

MR. DELANEY: Yes, it is, Your Honor.

THE COURT: -- by the parties?

Is it -- well, do -- what is the specific question, then?

MR. DELANEY: At the Supreme Court, yes.

THE COURT: Right. The specific question before the Supreme Court that they've asked the parties to address, and, again, I'm paraphrasing, but it's whether any and all pre-viability restrictions are unconstitutional. Isn't that the question?

MR. DELANEY: It is, Your Honor.

THE COURT: Okay. So we know we're talking about pre-viability issues in this case. And so assuming the court says, yes, the states can enforce pre-viability restrictions, that those pre-viability restrictions are constitutional, what does that do with Parts II and III? What does that do with Part I of this case at that point once they make that ruling -- if they were to make that specific ruling?

MR. DELANEY: So, Your Honor, let me just say I think you're essentially right on the question before the Court. But even more specifically what's before the court, the Supreme Court, is whether to revisit its prior holding that prior to viability is a ban -- not a restriction, Your Honor, a complete and total prohibition on abortion, is that in all cases always an undue burden under the undue burden standard?

We think that is a narrower question than what we're going to try in this case, which are restrictions that don't completely ban abortion but merely place restrictions and do they have the purpose and effect of creating a substantial obstacle for abortion. That's what's on trial. But that's not the issue before the Supreme Court.

What's before the Supreme Court is: Is a ban always an undue burden? And, Your Honor, we think at worst -- you know, we -- well, first of all, we think the Supreme Court will still uphold that a ban is unconstitutional under a longstanding 50 years of precedent. But we think at worst, if the court does take a different view, we don't think they're going to do away with the undue burden test.

In other words, the undue burden test which balances the benefits and the burdens of a particular restriction, or in this case a ban, will still be the test, and the evidence you'll have to show would still be the same under that. They would just be saying that -- whereas prior to this decision, a

ban was always considered an undue burden, they would just be saying, well, now they would hear -- you know, the courts would have to entertain evidence on a ban and balance the benefits and burdens.

So fundamentally the test doesn't change, Your Honor. The evidence that we will need at trial in terms of the purpose of the laws, the benefits and burdens of the restrictions that are at issue in Part II of this case, that would not change. And, again, Your Honor, we think that's in the worst-case scenario, which is why we think we can proceed without a decision.

THE COURT: Well, I mean, why wouldn't it be -- why isn't it prudent just to see what they're going to say?

I can imagine, you know, it could be nine different decisions, I mean, or nine different opinions. I don't know; it could be five or six opinions, and then we'll have to figure out whose opinion controls or what -- it could be a unanimous decision. It could -- all of this is speculation as to what the court might do, so why wouldn't it be prudent to just wait and see what they say?

I mean, because we may find that you might want to revisit some of the issues with respect to the experts. You might want to revisit some of the issues with respect to the evidence that bears on any of these burdens, any of these restrictions. I'm just trying to figure out how are the

parties benefitted by spending, engaging in substantial costs and fees, and they might have to redouble or sort of go down a different path based upon what the Supreme Court says about the particular question that it has asked the parties to address.

And part of the real -- you know, one of the real big issues in this case, I think, is that this Court and the Fifth Circuit has already ruled that the 15-week restriction is a ban for all practical purposes here in the state of Mississippi because there is no medical testimony that this court has seen that says that a fetus is viable at 15 weeks.

But if the Court -- if the Supreme Court says it doesn't matter, then I imagine there's going to be some dispute about the medical proof, and -- you know, I don't know.

But wouldn't it be prudent, Mr. Delaney, to just wait and see what -- the Supreme Court took this case up for a reason. I mean, there was no circuit split on this issue, none. They took this case up for a reason with that particular question. So we need to know what their answer or what's their response to that, because it's not common, I think, for the Supreme Court to take up matters that are not -- where there has not been a circuit -- where there is no circuit split. So help me figure out --

MR. DELANEY: Yes, Your Honor.

THE COURT: -- Mr. Delaney, and I think I called you Delaney.

MR. DELANEY: Yes, Your Honor.

THE COURT: You know, help me figure this out; why should we put your client through the expense of continuing to go forward down a path where we don't know what the ultimate answer will be?

MR. DELANEY: So, Your Honor, candidly, these are all issues obviously we've considered and discussed. You know, we've played out various scenarios on our team and with our clients, you know, talking about what's the right way forward.

And, you know, at its core, Your Honor, you sort of put your finger on it, which is: What is the Supreme Court going to do, and is it going to radically reshape the law in this area, fundamentally change the undue burden standard, and some of the other issues that you've raised.

And I guess, Your Honor, in our, you know, view, our strategic view, and especially working with our counsel, Center for Reproductive Rights, who tries these cases all over the country, you know, our view is that the most likely outcome is not -- is that it's not going to significantly change the law in terms of how we would try this case.

You know, that being said, Your Honor, you know, we are, you know, also conscious of the Court's time and the Court's busy schedule and, you know, the burdens of a trial,

especially with this hanging over the Court. So, you know, our position with Mr. Barnes and with this court is always the same; we have a view and we have a strategic view that we can try this case, even with a decision pending because of where we think the law is and where it's going to be. But, you know, we're willing to work with the Court and with Mr. Barnes to find a reasonable solution for all parties.

THE COURT: Okay. I think Mr. Barnes -- Mr. Barnes, I'll go back to you. I imagine you disagree with some of that, because I saw the expression on your face. So I mean --

MR. BARNES: Well, I'm sorry, Your Honor. I've never had much of a poker face, but it's no mystery to Mr. Delaney. We've had candid conversations about this, and it's no surprise to the Court that we have this disagreement.

But obviously, yes, we think it would be more prudent to wait. And the Court brought up the issue of fees. You know, not only do we have trial preparation fees, the cost of experts, all those sorts of things, which, you know, we might have to have a do-over on at least some of that. And -- but we also all know who the plaintiffs ultimately hope will be paying for that, because we know that if they're successful, they'll be asking the State of Mississippi to ultimately foot the bill. So cost is certainly a concern for us.

I think, you know, Your Honor, you put your finger on it when you talked about the specific question that the

Supreme Court has granted cert on. It's a really broad question. It could be a very narrow question or it could be a very broad question depending on how the court wants to address it. I think the court gave itself the leeway to make any -- any rulings and any sort of lesser-included rulings in that broad topic.

But since the court did -- as Your Honor said, without a circuit split and, as I mentioned earlier, rather unexpectedly after the cert petition had been pending for so long at the Supreme Court without action, if -- the fact that the court granted cert on the question of whether or not any or all pre-viability prohibitions on elective abortions are unconstitutional, it certainly implies that at least some members of the court think the answer might be no. It implied that there are at least some pre-viability prohibitions that could be constitutional.

Now, as I mentioned before, that could be narrow or broad. The court could simply say, no, they're not all unconstitutional, and remand it. Or the court could, you know, fundamentally dig into the standard and give guidance and instruction. We don't know, but it certainly is a possibility. And certainly if there is any ban or prohibition that the Supreme Court determines could be constitutional, we think it will necessarily say something about regulations or restrictions that don't rise to the level of a prohibition.

The second thing that I'd like to mention, Your Honor, that we haven't talked about yet is the pending Fifth Circuit case, the Texas dismemberment abortion case. We think that also is relevant in that, you know, there is a -- Mr. Delaney mentioned balancing several times, and obviously in the briefing on our motion, we take the position that the chief justice's concurring opinion in *June Medical* actually has changed the standard and is controlling. There is a circuit split on that issue, whether or not -- the question is whether a restriction or regulation is a substantial obstacle to a large fraction of women without any balancing or whether the courts are to actually perform benefits-versus-burdens balancing. Obviously there's a sharp dispute about that, and we acknowledge it.

The Fifth Circuit -- a panel in the Fifth Circuit back in the fall held that the chief justice's opinion was not controlling and that balancing was required. But a week later, the Fifth Circuit agreed to review that case en banc. The court heard oral argument at the end of January but has not yet issued a ruling. So that's secondary to the issue of the Supreme Court ruling, but it appears at least one of the issues the Fifth Circuit has before the entire court is the specific question of what does the undue burden test mean after *June Medical*? And there is some dispute about that, and we think that is another potential development that cautions

prudence.

THE COURT: And if the Supreme Court -- in whatever outcome of the Supreme Court decisions, they will remand it, but they will remand it to the Fifth Circuit; isn't that correct? And the Fifth Circuit would have -- I assume, you know, they will go through the opinion to determine whether or not it should be remanded to this court, I presume; right?

MR. BARNES: I presume so also, Your Honor. And I would say when you were talking earlier about what might have to take place with regards to the 15-week law, you know, which is specifically at issue, first of all, as we, you know, agreed and acknowledged in the Fifth Circuit, the fetal heartbeat law, which is still at issue here in Part III of the case, you know, it's moving along concurrently with Part II, and plaintiffs have filed a dispositive motion on the fetal heartbeat law.

That law is derivative, in a sense, of the 15-week law in that if the 15-week law or all prohibitions are unconstitutional, then the fetal heartbeat law necessarily would also fall.

However, if the 15-week law may be constitutional, if that's what the Supreme Court rules, then that brings into question the viability, for lack of -- I apologize. I didn't mean to -- for lack of a better term, the viability of the fetal heartbeat law as well. Your Honor, the stage we were

at, as the Court will recall with the 15-week law, is that we did put on -- we did designate one expert on fetal pain. The plaintiffs did not, instead moved to exclude our expert, and the Court granted that motion.

I think if there is any remand to the Fifth Circuit and then ultimately to this court, we certainly -- one, the Supreme Court is going to have to tell us what issues the court -- evidentiary issues are relevant to the court's decision. But certainly I am confident that the plaintiffs would want the opportunity for discovery at that point for whatever issues the Supreme Court deems relevant, including fetal pain. And at that point, I would anticipate we would see experts from them.

The one other thing I wanted to mention, Your Honor, is that, you know, the Fifth Circuit might well unofficially hold the Texas dismemberment decision until after the Supreme Court rules. And as you know, I mean, the Fifth Circuit, somebody could just hold it on a dissent or a concurrence on an opinion and they wouldn't have to necessarily take any official action.

But, Your Honor, we fundamentally agree with the principles the Court has discussed and about the potential ramifications that is the basis. Again, this is an unusual situation. It's an unusual situation to have this many laws at issue in a single case. It's unusual to have had, you

know, separate appeals.

And, again, I just -- we think it would be most prudent to wait. However, we respect the plaintiffs' position, and we understand the differences that the parties have. Again, that's why we respectfully filed a joint motion to let the Court know exactly what we did agree and could agree on and where we couldn't.

THE COURT: Mr. Delaney, let me ask you this question: If the Court agrees with your position, if this court, if I agree with your position, what does the plaintiff foresee a trial looking like that occurs maybe in the spring of 2022? What does a trial in this case look like?

All the discovery would have been done in Part II and Part III. You know, we will still have hanging over our head awaiting an opinion by the Supreme Court, so what does a trial look like that occurs prior to the Supreme Court's ruling?

MR. DELANEY: Yes, Your Honor. I mean -- and first, before -- I'll address that. Just one point that Mr. Barnes raised about the Fifth Circuit decision -- or the Fifth Circuit case that's pending right now. And as you correctly stated, one of the issues in that trial is any potential tension between the undue burden standard, you know, clarified by the Supreme Court in *Whole Woman's Health v. Hellerstedt* and Judge Roberts' concurrence in the *June Medical* case. I'd like to note first of all, that was already before the Fifth

Circuit before Mr. Barnes filed the -- his summary judgment, and so, you know, he was prepared to proceed with that case pending. So I'm not sure why that is relevant to this, you know, separate and apart from the Supreme Court case.

And also, Your Honor, we believe, and cases have been doing this already around the country, that you can brief it under both, and we believe we win under both. So it's not materially significant, so just on that point.

In terms of the trial, Your Honor, I think I already sort of hinted at it before, is that, you know, there are four other laws that are not bans. They're not complete prohibitions. They are things like the informed consent law, the telemedicine ban, you know, one that says only physicians can perform abortions in Mississippi, and lastly the separate licensing regime. So those four laws, they would go forward under the existing undue burden standard, which, as I said, again, we don't think it's likely that the Supreme Court is going to do away with that standard as opposed to potentially saying that even a complete prohibition would need to be, you know, further analyzed under that ban. So that would go forward. The evidence that's been generated by the parties in discovery would be substantially identical.

And even on the six-week ban, Your Honor, it's preliminarily enjoined under the undue burden standard, but we also have an equal protection claim not only against the

six-week ban but also against the other four laws that is not -- the equal protection claims are not before the Supreme Court right now, and so it could -- you know, we believe the trial could proceed under the current record on the undue burden claims with respect to the four non-bans laws, if I can put it that way, and also the equal protection claims as to all the laws at issue.

And then obviously, Your Honor, if the Supreme Court hands down a decision, you know, A, I think, especially since this is a bench trial, Your Honor, we could address any impact it has on those laws and your findings on those laws with supplemental submissions. And, Your Honor, you had already bifurcated the 15-week ban from this part of the case, and so if there needed to be some limited additional discovery, as Mr. Barnes alluded to, you know, we could deal with that case separately as we've done since the beginning of the trial.

It wouldn't prevent us from proceeding with respect to the other laws and the equal protection claims. So kind of at a high level, I think that's what the trial would look like, Your Honor.

THE COURT: Okay. Now, I take it it's your contention that based on the question that's before the Supreme Court, I know you say it's unlikely the Supreme Court will not overturn the undue burden sort of thing that now controls. It's not a foregone conclusion that the court will not overturn its

preexisting state of the law. I mean, they could do it. They could overturn that by addressing the specific question that the parties are arguing before the Court.

Is that a fair statement? They could. I mean, it's a possibility; right?

MR. DELANEY: Yes, Your Honor. I'm certainly not going to pretend I know exactly what the Supreme Court is going to do, so that is definitely a possibility. As you said, we don't think it's likely given what we've seen from the court on these cases over the last few years, but we understand it's a possibility.

THE COURT: Okay. And if they do, then the discovery and how the issues might be litigated on what I'm calling "the trap laws," I guess -- I think that's the nomenclature that's been used, I think, with respect to these other sort of restrictions -- the parties might have to go back and reanalyze how the specific laws affect persons here in Mississippi, how it affects the clinic here in Mississippi, and how it affects individual doctors who practice here in Mississippi. Is that a fair statement, Mr. Delaney?

MR. DELANEY: So, Your Honor, I'm not sure I agree completely with that in terms of the evidence that would have to be presented. So, you know, right now the evidence we're planning to put on at trial is around, for example, the purpose of the laws, right, which, again, we don't anticipate

the Supreme Court is going to do away completely with the purpose test and whether -- I mean, that's -- whether the purpose of a law is unconstitutional is not unique to the abortion context. Obviously it exists in voting laws and racial discrimination laws, so we don't anticipate they're going to do away with that. And I don't believe there's significant additional -- we have a pending motion with the legislators, as Mr. Jones mentioned earlier, but we don't think fundamentally that evidence is going to change or shift or need additional discovery.

And then on the benefits and the burdens of the law, you know, again, Your Honor, we think both parties have had a significant opportunity to put forward all the evidence on, for example, the benefits or lack of benefit of the law and also with respect to the burden. So I'm not sure how the Supreme Court decision would sort of, for example, change, you know, is a woman -- what kind of burden does it impose on a woman to have to make two trips to the clinic? I'm not sure there's additional discovery to be done on that just because the court, you know, for example, potentially says that while you can't ban it completely, you can have a complete ban pre-viability. I think it would still be relevant about whether, you know, women are struggling to get to the clinic or not.

THE COURT: Okay. All right, then. Thank you.

Any final words, Mr. Barnes?

MR. BARNES: Very quickly, Your Honor. I just wanted to mention that we think that the purpose prong of the test is at issue too and questionable because neither the Supreme Court nor other courts have ruled purely based on purpose that an abortion law should be struck down. And the Supreme Court, of course, in *Mazurek* said some things that cast some doubt about that, so we think that's still a murky area of law. I only mentioned that because Mr. Delaney did.

The other thing, Your Honor, is as far as these Part II claims, if the chief justice's opinion is determined to be controlling -- and as I said, there is a circuit split there already between the Sixth and Eighth Circuit -- evidence of benefits would be irrelevant. If the question is simply whether a law imposes a substantial obstacle on a large fraction of women seeking an abortion, then putting on evidence of benefit and discussing balancing and even considering the balancing would be unnecessary. So we think that would have an impact on the way the parties would approach trial and obviously the way the Court would be viewing the evidence.

However, Your Honor, we've hashed this out pretty good. The Court clearly understands the issues, and we have nothing further.

THE COURT: Well, let me just be clear on one thing.

All the discovery -- we're at the stage now that all -- at least as the case sits right now, the discovery is complete, and the next thing on the docket are the dispositive motions and things of that nature. And the trial date was actually set for December of this year. So is -- and I see you sort of reaching, Mr. Barnes, but isn't all the discovery complete at this time, at least with the posture of the case as it is today?

MR. BARNES: Yes, Your Honor. And I was just going to say with one possible exception, which is why Mr. Jones is on the call, in that there is still pending some specific limited discovery that the plaintiffs moved to compel with regards to certain legislative information and documents, and Judge Ball has not yet ruled on that motion. That's the one exception.

THE COURT: Okay.

MR. BARNES: But, yes, Your Honor, we did -- by hook and by crook, but we got to -- we got to the end of discovery by March 17th.

THE COURT: Okay. All right. All right. Well, I --

MR. DELANEY: Your Honor --

THE COURT: Mr. Delaney, you had something? I'm sorry.

MR. DELANEY: Yeah. No, I was just going to agree with Mr. Barnes. But also, Your Honor, we've always been focusing a fair amount on the trial today, which makes sense, but there's also the pending dispositive motion schedule, which I

believe both parties had requested a continuance on that as well. Again, we disagreed, you know, on the timing of that. I think the -- but I think that both parties were fully in agreement that with the upcoming briefing and argument schedule with respect to the Supreme Court, we'd very much appreciate a continuance on the summary judgment briefing, at the very least, to deconflict with that schedule. And I think we didn't -- we didn't set out an exact schedule because I think to some extent it depends on when you're going to set the trial date, Your Honor.

But I did just want to flag that, and, you know, the plaintiffs do just want to reiterate, A, that at the very least, we'd like to deconflict that briefing schedule against the Supreme Court schedule. The parties are happy -- you know, once Your Honor sets a trial date, I think the parties are happy to work out a reasonable schedule on that.

But, you know, if Your Honor is going to delay the trial until after the decision, we would sort of request the same consideration around the summary judgment briefing for I guess the similar reasons that you would grant a continuance until after the decision.

THE COURT: Okay. Well --

MR. BARNES: And, yes, Your Honor, we -- I just want to say we agree, and I think we agreed with the plaintiffs and said so in the motion that we understand that whenever the

Court sets the trial, we would, you know, have to work backward from that to find an appropriate briefing schedule. But I appreciate Mr. Delaney bringing that issue up, because we do agree with him on that point.

THE COURT: Okay. Well, I think we all are in agreement on one thing: the need to deconflict our schedule with that of the Supreme Court. Even I will bow to the Supreme Court on this one here, okay?

So I think I have no problem doing that, and I know the parties will have to spend a substantial amount of time in preparation for the argument that is set to go forward at some point in time, whether it's the fall or even early winter, spring. Whenever they do it, I know it's going to take a substantial amount of time from the parties to prepare for that, and I will not stand in the way of your preparation -- or this court will not stand in the way of your preparation for that matter.

I'm going to -- if you hear it, I'm inclined to, you know, grant this motion in some way. We'll try to figure out a timeline and a schedule and all of that, but I know this case will not be tried in December; that I know. The question will be whether we should just wait until the decision from the U.S. Supreme Court, and I'll tell you I'm inclined to do that, whether we should wait on that decision and schedule a status conference sometime after the fact.

I'm not even sure -- I think Mr. Barnes's proposal is two weeks after the Supreme Court has issued a decision to have a status conference. I'm not sure two weeks would be adequate because, again, I think the case is going to be remanded to the Fifth Circuit. And they might have something to say about what has been returned to them or what has been returned to it. And then they -- that court might give us specific instructions about how to go forward, so, you know, that's what I'm thinking in my mind right now, just to give you some thoughts about where I will come down.

But I do want to pivot for a second and have the parties for a few minutes address this issue on the other motion about the -- exceeding the page limitation on the current briefing. We got the motion for reconsideration on yesterday that was filed by the State, so I do want to talk about that. I don't know if I'll rule today on it, but I want to give you an opportunity, Mr. Barnes, to address that particular motion.

MR. BARNES: Yes, Your Honor. And, again, as the original motion was unopposed, the relief in the motion for reconsideration is also unopposed. I tried to be very -- to very clearly delineate what plaintiffs agreed to, which is the relief, the excess pages, and to make clear, I wasn't trying to put words in the plaintiffs' mouth in our memorandum.

But the purpose of the memorandum, Your Honor, was to

provide additional information to the Court. Our original motion was quite short and perfunctory -- excuse me -- and we felt that providing the Court with additional information about the breadth and scope of the topics and the complexity would help demonstrate the need for additional page limits.

Obviously, Your Honor, we -- we could have filed our original motion earlier, and we did not. And that, you know, obviously falls on us. However, because our first brief was 44 pages, if the Court keeps the limit at 45 pages, that would only allow us one page for any reply, and, Your Honor, that -- that would be inadequate.

We understand that the Court might not -- that if the Court was inclined to grant us any relief, the Court might not go all the way to the 70 pages we'd originally requested, although that's our first request, because we think that that amount of space is needed considering the number of topics.

And as Mr. Delaney mentioned in the earlier discussion, you know, we -- we tried to address equal protection claims, *et cetera*, and did address them in our original brief, but I would not call our analysis complete. We simply -- you know, we had to prioritize and pick and choose. But that's why in our motion, Your Honor, we asked for -- again, renewed our request for 70 pages total for both sides on that one motion. We're not asking for any relief concerning the *Daubert* motions and the page limits.

And in the alternative, though, if the Court does not find that 70 pages are necessary in the Court's opinion, that's why we asked for 60. Your Honor, that would -- that would still allow the State roughly 16 pages for a reply brief, which we think would be reasonable. And I'd be happy to answer any questions the Court might have, or if Mr. Delaney has anything if I've, you know, gotten anything incorrect or if he just feels like he wants to speak as to any of these issues, but we would just renew our request.

THE COURT: And --

MR. BARNES: I -- I apologize we didn't provide that additional information to the Court in our original motion.

THE COURT: Okay. Well, with respect to the original motion, the original motion suggested, I think, that the plaintiffs were not requesting any additional pages, that they were going to file their motion and responses all within the limitations of the current rules; is that correct?

MR. BARNES: Not exactly, Your Honor.

THE COURT: Okay.

MR. BARNES: Plaintiffs were -- and as they represented and did, said that their motions would all fall within the 35-page limits, you know, from the local rules and that -- and so we agreed that their motion and our response to that would be bound by the 35-page limit.

However, our agreement with the plaintiffs was that

whatever page limits the Court granted to the State for briefing our dispositive motion, that the plaintiffs would have an equal number of pages to respond. So, for example, if the Court were to -- like, at 45 pages now, if that's all the State has and we have one page left for a reply, then the plaintiffs would have 45 pages for their responding brief.

However, if the Court extended that out to 60 or 70 pages, the plaintiffs would likewise have that amount of space for their reply brief. That was our intent, and I apologize if that was not clear from our filing.

THE COURT: Okay. Now, in looking at the motion for reconsideration, the State -- I believe there's a line in it that the State contends that some of the arguments of the plaintiffs are baseless, and if that is the case, I mean, why do we need -- at least with respect to the baseless arguments, why do we need, you know, any number of pages with respect to arguments that the State deems are baseless?

I mean one, two, you know, a paragraph. I mean, why do we need a lot? I know they raised a lot of issues, you say, under the trap laws and the reasonableness of the burdens. And I think the State says tying each of those together is baseless, has not been done, or whatever reason. I mean, so why -- why do we need so many pages, Mr. Barnes?

MR. BARNES: Your Honor, because it's -- it's -- it's actually complex to get -- it's complex and difficult to get

down to why at the core some of these issues are baseless. The one -- the leading example, I think, of that that would be the -- the -- we've been calling it "the combined effect" or the -- I'm sorry?

THE COURT: Basically tying all the restrictions --

MR. BARNES: I'm sorry, Your Honor.

THE COURT: I'm sorry. Go ahead.

MR. BARNES: I was having a senior moment; I apologize. And obviously we have a sharp disagreement. Plaintiffs certainly believe there is a basis for that. We do not. We think -- and I think that issue alone could take a 35-page brief in itself. So I expect that, Your Honor, at the very least plaintiffs would want the additional pages to be able to -- I don't want to put words in Mr. Delaney's mouth, but they, you know, would want to respond to those vigorously, I would anticipate.

THE COURT: Okay. Well, I know the State has already on the front end exceeded its full page limitations by about nine or ten pages, and, you know, when -- I guess when these motions -- when this motion was filed, it was filed at the same -- I guess within that same motion was -- or might have been a separate motion, was a request about the *Daubert* issues and all of the pages, the request for exceeding the page limitations or adding to the page limitations there. So the Court is being confronted with having, you know, hundreds of

pages of argument on these issues, and that's what I was faced with when I took up -- I took into consideration the first motion.

Mr. Delaney, do you have anything to say with respect -- on behalf of the def- -- excuse me, the plaintiffs here?

MR. DELANEY: Your Honor, other than to obviously contest Mr. Barnes's assertion that some of our claims are baseless, no; we take no position on this, and we will -- we will do the briefing within whatever limit the Court sets.

THE COURT: Okay. Okay. I don't think I have anything else. I know we have some of the other parties or any of the other individuals or whatever; is there -- does anyone wish to weigh in on anything?

Because we have this record here, and I know it's a record that preserves everything for appeal and for posterity. So this is your opportunity to make sure that you have been heard. Is there anyone else that needs to be heard on anything?

Okay. All right. Counsel, thank you for making yourselves available. We will get some sort of order out -- well, this -- there will be a continuance; I can tell you that. This trial will not go forward in December; I can tell you that. In what form or how long, we'll get something out to you, so you can start focusing all of your energy to the

cert grant and preparing for the case that is before the U.S. Supreme Court.

Is there anything additional?

And I know --

MR. DELANEY: Yes, Your Honor. There is --

THE COURT: Mr. Delaney? Mr. Delaney?

MR. DELANEY: Yeah. Apologies, Your Honor. I just wanted to --

THE COURT: No. No.

MR. DELANEY: Yes, sir. Can you hear me?

THE COURT: Yes. Go ahead.

MR. DELANEY: Okay. I just wanted to confirm. You mentioned the trial, Your Honor, but obviously with the pending -- there's a pending deadline on the summary judgments. I just wanted to confirm the order will move those dates as well so the parties -- I think it's June 18th is the current date.

THE COURT: Yes. Yes. Yeah. Yeah. I mean, I'm going to allow the parties to focus their full attention to the case that is before the U.S. Supreme Court. No need for you-all to be scurrying around doing things here when that time and energy could be focused on that extraordinary question that is before the U.S. Supreme Court.

MR. DELANEY: Thank you, Your Honor.

THE COURT: All right. Is there -- again, Counsel, all

counsel, I appreciate you for making yourselves available for this call. The Court will issue something -- it might be a text order. It might be a short order -- in due course, but you can stand down in this case for right now.

Thank you so much for your time. That's all that the Court has before it in this matter. The Court is in recess.

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COURT REPORTER'S CERTIFICATE

I, Candice S. Crane, Official Court Reporter for the United States District Court for the Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the proceedings had in the forenamed case at the time and place indicated, which proceedings were stenographically recorded by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

THIS, the 24th day of June, 2021.

/s/ Candice S. Crane, RPR CCR

Candice S. Crane, RPR, CCR #1781
Official Court Reporter
United States District Court
Candice_Crane@mssd.uscourts.gov